

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ENSCO OFFSHORE CO., ET AL

CIVIL ACTION

VERSUS

NO. 10-1941

KENNETH LEE "KEN" SALAZAR,
ET AL

SECTION "F"

ORDER & REASONS

Before the Court is the government's motion to further amend scheduling order for plaintiffs' Count IV. For the following reasons, the motion is DENIED.

Background

The plaintiffs' amended complaint comprises six counts, four of which have been resolved through motion practice. Only Count IV, challenging the delay to the government's processing of drilling permit applications, and Count V, challenging the requirement of a planning document in connection with production and development activities in the western Gulf of Mexico, remain. The trial on Counts IV and V is scheduled for May 16, 2011, and is expected to last two days. The government, asserting that a trial is unnecessary on Count IV,¹ moves to amend the scheduling order to include only the present briefing schedule for dispositive motions.

¹ Count IV is the subject of cross-motions for summary judgment currently set for a hearing on the papers on April 28, 2011. The government's motion addresses only Count IV.

Law & Analysis

I.

The government asserts that the Court's judicial review here is limited to the agency's administrative record and requests that the Court enter a schedule for dispositive briefing on the merits. Even if the Court finds that extra-record evidence is appropriate, the government asserts its scope and use are strictly limited and do not warrant a trial. Plaintiffs do not dispute that judicial review in APA cases should focus on the administrative record. The plaintiffs assert, however, that this case presents special circumstances that justify consideration of evidence outside the administrative record—issues that focus the government's abuse and bad faith.

II.

The Administrative Procedure Act instructs that in evaluating claims to compel agency action that is unreasonably delayed, or to hold unlawful and set aside arbitrary and capricious agency actions, "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706 (2006). The United States Supreme Court emphasizes that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court," Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam); "[t]he task of the reviewing court" typically "is to apply the appropriate APA standard of

review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985). "The factfinding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking." Id. at 744.

But even though the Court's focus necessarily is on the administrative record, it is well-settled that narrow circumstances may justify the Court's consideration of extra-record evidence, such as "'when there is a strong showing of bad faith or improper behavior'." Williams v. Roche, No. 00-1288, 2002 WL 31819158, at *3 (E.D. La. Dec. 12, 2002) (quoting Common Sense Salmon Recovery v. Evans, 217 F. Supp.2d 17, 20 (D.D.C. 2002); accord Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2005); Murakami v. United States, 46 Fed. Cl. 731 (Fed. Cl. 2000) (also allowing consideration of extra-record evidence when the agency's failure to take action is alleged). "[A]dministrative officials who participated in the action," moreover, "may explain their actions" through affidavits or live testimony. Harris v. United States, 19 F.3d 1090, 1096 n.7 (5th Cir. 1994); see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971). Simply put, the government may not hide behind the administrative record in the face of rationally articulated charges of bad faith or improper conduct.

III.

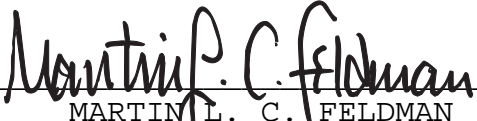
The parties' dispute presents two questions for the Court: (1) whether consideration of extra-record evidence is appropriate here and (2) whether a trial is necessary to resolve Count IV.

Mindful that it is to "go beyond the agency's record only in exceptional cases," Franks v. Salazar, No. 09-942, 2010 WL 4386744, at *3 (D.D.C. Nov. 5, 2010), the Court concludes that this case targets charges of agency bad faith that could merit this Court's consideration of extra-record evidence. This troubling question, however, will be taken up on a case-by-case basis, as it arises either in the context of the cross-motions for summary judgment or, if necessary, at trial. The question of whether a trial is necessary is also not yet ripe for review.

Pending before the Court are cross-motions for summary judgment which could obviate the need for a trial on Count IV.

The government's motion is DENIED.

New Orleans, Louisiana, April 20, 2011.


MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE